

JEREMY ALLEN MAYFIELD and,) DOCKET NO. 3:09-CV-220
MAYFIELD MOTORSPORTS, INC;)
)
)
vs.)
)
NATIONAL ASSOCIATION FOR STOCK)
CAR AUTO RACING, INC, et al.)
)

APPEARANCES:

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LAURA ANDERSEN, RMR
Official Court Reporter
United States District Court
Charlotte, North Carolina

1 P R O C E E D I N G S

2 THE COURT: Good morning, counsel. I will go over
3 a little bit on scheduling.

4 As the Charlotte contingent understands, the
5 funeral for Judge Cliff Johnson is at noon. I will be
6 leaving, driving our Chief Judge to that funeral at 11:15.
7 If we are not through, which I anticipate to be the case, we
8 will resume at 2:00, pending arrival back from the funeral.

9 Will you be arguing, Mr. Diehl?

10 MR. DIEHL: I will.

11 THE COURT: Who will be arguing for the defense?

12 MS. MAHER: I will be doing part of it and
13 Mr. Hendrick will also be doing part.

14 THE COURT: How long do you folks anticipate
15 taking?

16 MR. HENDRICK: We think, Your Honor, probably an
17 hour and 15 minutes.

18 THE COURT: Mr. Diehl.

19 MR. DIEHL: I'd like to do it in 30 minutes and be
20 done by 11:00 and go to the funeral. I'm going, too.

21 Seems to me you have so much paper already --

22 THE COURT: You don't need an hour and 15 minutes,
23 you can't have an hour and 15 minutes.

24 How ever long Mr. Diehl takes, you can have. And
25 then Mr. Diehl may have a very short rebuttal thereafter.

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1 Because there is a ton of paper as has been pointed out.

2 All right, Mr. Diehl.

3 MR. DIEHL: Judge, we are here to ask Your Honor
4 to lift a suspension of Jeremy Mayfield, which prevents him
5 from driving a stock car in the NASCAR Sprint Cup Series.

6 We're asking you to do that because the suspension
7 which creates all the harm, irreparable and otherwise, is
8 directly caused by a reported drug test result done in a
9 manner that is patently unfair, and eliminates according to
10 the interpretation of NASCAR any opportunity for
11 Mr. Mayfield to show anybody that he is not a recreational
12 drug user.

13 Mr. Mayfield has been driving in NASCAR 17 years.
14 He's had some successes. This year he started his own team.
15 He was the driver.

16 So those are the two plaintiffs, Mr. Mayfield who
17 is here. Stand up, Jeremy.

18 And his team, which he and his wife, who's also
19 here, own.

20 It is not Hendrick Motorsports. It is not Jack
21 Rousch Racing. It is not Richard Childress. It's a low
22 budget, try to get started, be successful, single car race
23 team.

24 The driver has absolutely no history of drug
25 abuse, as he says in his affidavit, I've never taken

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1 methamphetamine.

2 NASCAR's president has called him in a public
3 announcement, a recreational drug user. They filed a
4 counterclaim that says he's been using methamphetamine --
5 lest we be concerned about the word that is now widely
6 discussed in the media -- they allege he's been using it all
7 season. Despite the fact that he took a drug test at the
8 beginning of the season, and had no indication of any drug
9 in his body; that was just January.

10 The suggestion that the quantities of the
11 methamphetamine in his urine sample are so large, would
12 require that this man be a habitual user, that he consumes
13 enormous amounts of the drug. You'll see the 48,000 -- the
14 technical terms defy me -- nanograms -- John reminds me.

15 Basically indicate, if you learn anything about
16 methamphetamine, he's either a walking zombie or he's dead
17 if he has that much methamphetamine in his body in early May
18 when this test was conducted.

19 He says, I've never touched the stuff.

20 Nobody offers any opinion that he ever exhibited
21 any physical characteristics of methamphetamine, including
22 the five people that worked with him whose affidavits are
23 before you, and who were in Richmond at the race.

24 And more importantly, neither of the two
25 affidavits submitted by NASCAR, from the collector of the

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1 sample, and the fella that was also there, Mr. Carter,
2 opined, mentioned, that Mr. Mayfield's teeth were rotting
3 out, that his eyes were sunken, that he was displaying any
4 physical characteristics of what has been commonly seen by
5 almost everybody involving people who use -- who see or know
6 people involving methamphetamine.

7 One of the affidavits from one of Mr. Mayfield's
8 crew persons, was a nine year police officer from
9 Winston-Salem.

10 There's nothing said by anybody of anything at an
11 earlier time at the beginning of the season, the races that
12 he participated in, that demonstrates he exhibited any
13 conduct that shows signs that he must be on something.

14 They mention in their responsive papers that he's
15 had three wrecks.

16 If that were the criteria to demonstrate drug use,
17 there wouldn't be any NASCAR drivers. Indeed, the wrecks,
18 as we all know, are what brings people to the speedway.

19 Now they don't want anybody to get hurt. And it's
20 almost a duh statement when they say they don't want drivers
21 using illegal drugs on a racetrack. Well, like who does.
22 Who wants drivers on Interstate 85 using drugs, or in Myers
23 Park or any other place.

24 This isn't a legitimate argument, that if
25 Mr. Mayfield is permitted to drive, that it will endanger

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1 NASCAR drivers, it will endanger the public. Nobody will
2 want to race against him.

3 As the result of their decreeing -- which is what
4 they have done -- that he used drugs. And we're not going
5 to let you race, and you don't get to challenge the test.

6 He has been arrested, if you will, just before the
7 race at Darlington. He has been tried, when they told him
8 and sent him a letter telling him that he was suspended.
9 And he's been convicted.

10 He has been told in no uncertain terms, you have
11 one choice, Mr. Mayfield, you comply with our letter, you
12 get down on your knee, you do a number of mea culpas, maybe
13 three Acts of Contrition, four Lord's Prayer, the Apostle's
14 Creed, and then we may consider that you come back. You
15 don't have a choice about saying, hey, maybe your test was
16 wrong.

17 Is it possible that the preeminent Dr. Black and
18 the Aegis lab made a mistake in conjunction with what they
19 did.

20 We asked him, and it's in Mr. Mayfield's
21 affidavit. They do like 3,000 of these tests a day, on 800
22 and some samples. Is it possible something got mixed up.

23 Did they comply with any reasonable protocol when
24 they collected the sample in a trailer, in a cluttered
25 bathroom, with cups just sitting there. Is it possible that

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1 a cup got mixed up.

2 Well the answer is, of course, all those things
3 are possible. And the question is, is Mr. Mayfield given an
4 opportunity to challenge that.

5 Which leads us to the crux of the case. NASCAR
6 adopted substance abuse policy. You have a copy of it. It
7 went into effect in January. You can read it from head to
8 toe, and you will not find any particular subject about what
9 is going to be violative of the policy.

10 It says, substances that in NASCAR's determination
11 may effect adversely the safety and well-being of the
12 competitors.

13 THE COURT: Didn't they send out a memo listing a
14 whole bunch of stuff?

15 MR. DIEHL: That they said they test for. And
16 they said, that memo, on December the 8th, you have it, we
17 have it, itemizes things that they test for. For example,
18 codeine and pseudoephedrine. Those are not banned. And
19 they're not banned by the December the 8th memo. But they
20 say they are going to test for those among others, including
21 methamphetamine and cocaine.

22 But they don't have an identifiable list in the
23 policy of what is banned. If they decide to ban Coca-cola
24 or coffee or orange juice or anything else, their argument
25 is, we can. We have the absolute discretion to decide

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1 what's banned by the policy.

2 In addition, the policy says, the samples will be
3 tested at a SAMHSA lab. All testing will be done at a
4 facility or facilities exclusively selected by NASCAR. From
5 among those facilities that have been certified by the
6 Substance Abuse and Mental Health Services Administration of
7 the United States Department of Health and Human Services,
8 and/or by the College of American Pathologist Forensic Urine
9 Drug Testing Program.

10 That's all it says.

11 And to be a SAMHSA lab, you have to follow certain
12 procedures. Yes, the procedures say, they're applicable for
13 federal drug testing. And the question is, so what.

14 If you are referring testing to a SAMHSA lab, the
15 reasonable expectation of NASCAR -- whether they now say, oh
16 no, they don't have to follow SAMHSA testing procedures.
17 But the reasonable expectation is, they will follow those
18 procedures.

19 And this isn't testing federal employee stock car
20 drivers. It's testing individuals, whether they're drivers
21 or crew chiefs or crew members, from the public.

22 But it is disingenuous, Your Honor, to argue that
23 we don't have to adhere to any procedures that are set out
24 by SAMHSA, even though it has to be done by a SAMHSA lab.

25 In the brief and in their papers to support this,

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1 they suggest that they test pursuant to the World
2 Anti-Doping Agency, WADA. And we have those rules and
3 regulations. They're never mentioned in the substance abuse
4 policy. And if you read them, they provide nothing to help
5 NASCAR. Because their procedures, contrary to what
6 Dr. Black says, splits samples, and permit a test of the "B"
7 sample.

8 And that's what the -- that's the crux of the
9 issue here. That they get Mr. Mayfield's urine sample.
10 It's split into "A" and "B". It gets to Aegis. "A" is
11 tested. Turns out positive. Jeremy is notified.

12 Then he gets a contact from this fella Aukerman,
13 who is a medical review officer, which is a procedure within
14 the SAMHSA regulations and procedures.

15 Why do they use an MRO, if they're not following
16 SAMHSA regulations?

17 In fact, they are suppose to follow those, and
18 that's why they use the MRO, who is suppose to tell
19 Mr. Mayfield, you didn't do so good on the "A" sample. We
20 have a "B" sample. You have 72 hours to tell me, Dr.
21 Aukerman, where to send it to an independent lab, where it
22 will go in a sealed capsule, just like we got it. The seal
23 will not have been broken. And the second lab, independent
24 of Aegis, also a SAMHSA lab, will test it. And we'll get
25 yet another view of the process, and whether or not this is

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1 a legitimate result, or how it might have been determined
2 that it was positive, when the "A" sample was tested by
3 Aegis.

4 But that policy, Your Honor, builds into the
5 process, at least an opportunity for Mr. Mayfield to have
6 reexamined, before he's suspended, banned from NASCAR, the
7 "B" sample in its pristine, no broken seal state. Is that
8 important? You bet.

9 The SAMHSA regulations say, and we've quoted them.
10 That under their rules and regulations if they get a broken
11 sealed sample, the testing is stopped. They will not test,
12 under their regulations, a broken sealed sample. That's
13 Section 2.4 of the rules and regulations of the SAMHSA
14 testing.

15 Upon -- if they find that a specimen bottle label
16 seal is broken, or shows evidence of tampering, but broken,
17 the specimen cannot be tested. It's treated just like A.
18 And if you get to an A bottle and its seal is broken, the
19 test stops.

20 So they would not test a broken seal, properly.
21 Because nobody really knows what has happened. And
22 everybody knows, that if the seal is properly -- has been
23 properly maintained, at least it gives an opportunity to
24 look at the contents of the specimen and provide an
25 independent result.

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1 Now, what happened here -- any question that Aegis
2 tested B and broke the seal.

3 Mr. Mayfield says, I didn't tell them to do
4 anything. You know, I'm shocked Mister -- the MRO is
5 telling me you got this. We have a B. And Jeremy says,
6 what's going to be the difference between A and B. If A
7 tested -- what -- I don't understand.

8 And the MRO, apparently takes that as his
9 authority to have the "B" sample tested, but not by an
10 independent lab. And he never advises Jeremy of his right
11 to have an independent test. That's not controverted.

12 Even though Aukerman's affidavit relates a
13 conversation that's different than Jeremy relates the
14 conversation, it's almost immaterial.

15 Any question that he authorized Aegis to do the
16 test, and they did it within two days of the first test.
17 Thereby eliminating the 72 hours, and the possibility to get
18 it to an independent lab.

19 And they say that's perfectly okay, because we,
20 NASCAR, are not bound by the lab that SAMHSA operating under
21 SAMHSA procedures.

22 We have affidavits before you that say that's not
23 good lab practice. Nobody disputes what the regulations
24 say, that the procedures are applicable to testing of
25 federal employees. That begs the issue.

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1 The issue is, when you designate it as a SAMHSA
2 lab, then, can you make up the procedure that the lab
3 follows, because you're not testing federal employees? Of
4 course not.

5 I mean, arguably, Your Honor, and I'm thinking
6 about this last night, the samples could have gotten to
7 Dr. Black, and because there is no procedure, not in the
8 NASCAR policy.

9 And now according to Black, he's not bound by the
10 agency that his lab is a member of, and he's required to be
11 a member of, and he's required to do all these procedures to
12 keep his license related to federal employees.

13 He gets these materials and says, well I don't
14 have any rules. I'm gonna follow the taste test. Give me a
15 cup of Mr. Mayfield's urine, I'll take a hit, and I'll
16 decide, yeah, that's methamphetamine, report it back
17 positive.

18 Taken to its logical extension, that's exactly
19 what these people are arguing. We're not bound by anything.
20 We're not bound by good lab practices. We're not bound by
21 anything. We're NASCAR. We can do what we want to do. We
22 can decide after the fact what's banned and what you should
23 be suspended for.

24 I read one article, in trying to get up to speed
25 on this stuff by a commentator who's a lawyer, on their

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1 theory, they could ban chocolate milk. Or as I said, and
2 not in advance, coffee, Coca-cola, orange juice. And decide
3 after the fact, not tell the employee, or the party to the
4 contract, that they have decided this is going to be a
5 grounds to eliminate your right to run your race car.

6 Now, they want to equate NASCAR to the NFL, the
7 hockey league, NHL, Major League Baseball. All those groups
8 have collective bargaining agreements. They've had their
9 members and their representatives agree on a procedure.

10 So what they do, and whether they use SAMHSA labs
11 and a quarter, are worth 25 cents. Their workers, members,
12 have agreed in advance on a procedure.

13 The race car drivers haven't agreed on a procedure
14 they don't even know about. They've agreed that there's a
15 substance abuse policy, and they will be bound by it, but
16 they expect that there's a reasonable substance abuse
17 policy. There's something that gives them some protection
18 when they're accused, possibly erroneously, of taking a
19 drug.

20 The issues that you've got to decide are not novel
21 here. We've all been dealing with *Blackwelder* for a long,
22 long time.

23 And so we understand that we've got to show
24 likelihood of irreparable harm to Mayfield, if you don't
25 give us an injunction. The likelihood of harm to NASCAR if

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1 you give us an injunction. The likelihood that Mayfield
2 will succeed on the merits, and the public interest.

3 And if we make a strong showing of irreparable
4 harm, the Court then balances the likelihood of the harm to
5 Mayfield, against the likelihood of harm to NASCAR.

6 If that balance weighs in our favor, then
7 typically you go on to the next -- as we read the cases --
8 the next criteria, which is, are we likely to succeed on the
9 merits.

10 They think there's no irreparable harm, because we
11 can get monetary damages. But that flies in the face of
12 reality. They point out that, you know, he's got this
13 record. And he's done this.

14 But at the same time they tell you that, he
15 doesn't know whether he's even going to make a race.

16 All the races are -- they have qualifications.
17 Unless like this past weekend in New Hampshire, it rained
18 out. So they just got set by where you are in the
19 standings.

20 So you don't know whether he's going to make a
21 race. Indeed, he hasn't made a couple races this year.
22 Moreover, if he makes the race, you don't know if he
23 finishes. And if he finishes, you don't know where he's
24 gonna finish.

25 And if he has sponsors and he's not racing, the

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1 sponsors will not pay him to put their name on his car when
2 it doesn't drive around the track and it's shown worldwide,
3 pursuant to either TNT, what it's on right now, or ESPN, or
4 whatever the television outlet is. Not to mention the
5 people at the various racetracks who get to see it.

6 He loses his people, who are his employees. He
7 loses the opportunity to make any money, if you take away
8 his privilege of racing, which is what they've done.

9 And the case law makes clear that this kind of
10 loss is the kind of loss that's irreparable. We cite you
11 *Multi-Channel*, it's a Fourth Circuit case. *Merrill Lynch*,
12 is another Fourth Circuit case.

13 The *National Football League* case where they got
14 an injunction against the players association, against the
15 NFL. Because they were banning people based on a substance
16 that nobody knew was a prohibitive substance.

17 These kinds of losses are not directly compensable
18 in monetary damages, and they qualify as the irreparable
19 harm that can be prevented with issues of an injunction.

20 Here, Your Honor, if Mr. Mayfield is telling the
21 truth, on his way to Richmond, he took a Claritin D which he
22 can buy at a drugstore. It has pseudoephedrine -- which
23 anybody that's been awake for the last 25 years knows is an
24 ingredient of methamphetamine -- and they put it behind the
25 counter at your Rite-Aid. So you just can't go take it off

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1 the shelf, they take your name.

2 So he took a Claritin D, it's a sponsor of Carl
3 Edwards' car. It rides around on Sundays or Saturdays, with
4 his sign all over the side of the car advertising it.

5 Who in the world could conceive that if you're
6 dealing with a stuffy nose and you take a Claritin D, and
7 you take another one, six hours later, you're violating a
8 drug policy.

9 Who could conceive that if you have ADHD and you
10 are prescribed Adderall, as literally millions of people
11 are, and you take it in accordance with what you're told to
12 take it with your prescription, that you're violating a
13 NASCAR drug policy.

14 If Jeff Gordon takes Allegra, which is all over
15 the internet, is he violating the drug policy. I mean, is
16 Allegra banned? Is aspirin banned? Can they decide after
17 the fact that these things are banned, and thereby banish
18 the driver to the sidelines until he can get through a
19 lawsuit. I say to Your Honor, that's patently unfair. And
20 it shows that Mr. Mayfield has irreparable harm.

21 It's also true that there's no harm to NASCAR,
22 despite the parade of horrors that's in the brief.
23 Drivers will stop racing if Jeremy's out there. It should
24 increase his winnings, if he's the only car. But that's
25 what they say.

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1 They announce that they won't be able to properly
2 do their drug policy, if he's told that you can go back
3 racing because you didn't do this one right.

4 He volunteered to be subject to their policy.
5 Yeah, he did. And he thought, as every driver thinks, that
6 the policy comes with it, the responsibility of good faith,
7 fair dealing, in administering the substance abuse policy.

8 So even if they don't have prohibited drugs, and
9 they don't have a specified procedure, the driver can rely
10 on the fact that it's a SAMHSA lab, and these guys are not
11 quacks, and they're not doing the taste test. They're out
12 there going through all the hoops, jump through all the
13 hoops, go through all the procedures that make it a proper
14 test. Then we're going to leave something aside so that
15 somebody can provide backup information. That's what they
16 reasonably rely on.

17 So there's no harm to NASCAR if Jeremy gets to
18 race this Saturday night in Daytona, which is what we are
19 asking you to permit him to do.

20 And there's absolutely nothing that indicates,
21 really, that they can be harmed going forward with Jeremy,
22 because they can drug test him every day, every day, under
23 their policy, under their rules. Only thing they can't do,
24 is do it unfairly.

25 They can test him. They can follow the collection

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1 procedures. They can follow -- keeping the vial secure.
2 Send it to a confident lab. They can test it. They can get
3 a result. If there is a positive result, they can send it
4 to another lab for confirmatory testing, same SAMHSA lab,
5 that lab can test the vial, because the seal has not been
6 broken. And the policy goes on. So there is no harm to
7 defendant.

8 And if you're weighing the balance of this
9 irreparable harm, it is overwhelming in favor of Jeremy
10 Mayfield and his company.

11 It is not anywhere even close, I respectfully
12 suggest, that somehow they've got an even balance, or that
13 in some sliding scale consideration, you get down to
14 thinking, gee, they're going to be harmed if I enter an
15 injunction.

16 I suggest to the Court that there is a substantial
17 likelihood that we win this case. So success on the merits,
18 which is the next issue when you're considering an
19 injunction, favors Mr. Mayfield.

20 There isn't any question about what they didn't do
21 in accordance with the SAMHSA procedures. They just blew
22 that. There isn't any question that they could have made a
23 mistake.

24 There isn't any question that they didn't secure
25 the "B" sample and let it go to someplace else. And that's

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1 the critical issue on the part of do we prevail on the
2 merits. There's really not much debate about it. Not much
3 for a jury to decide.

4 How in the world -- I keep asking this -- can they
5 have a SAMHSA lab, it's got to be SAMHSA. And to be SAMHSA,
6 SAMHSA's got to comply with these very elaborate policies
7 established by the federal government.

8 And they say, well it's not federal government
9 testing, therefore they can use the taste test, which is the
10 bottom line of their argument. We can do anything we want.

11 That can't be. They can't likely prove that, and
12 be entitled somehow to defeat the claim on that theory.

13 So we say, Your Honor, that there's a substantial
14 likelihood of our success on the merits. There's almost
15 none for NASCAR.

16 Can they intentionally or negligently not follow
17 the guidelines with impunity. Our evidence before you
18 includes that the A/B, breakout, and the independent test of
19 the "B" sample is good lab policy. There's nothing
20 different in WADA.

21 In North Carolina, Your Honor, and we cite you to
22 the 9230, which is drug testing requirements in this state,
23 you have to do the same thing; you have to test the B by an
24 independent lab.

25 So can they ignore their own regulations? Can

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1 they negligently not comply with their regulations? We say,
2 no. They must be held accountable.

3 And if you don't follow required procedures, then
4 drug tests are thrown out. And we cite you to three
5 specific cases that are in the brief on that holding.

6 And we also direct you to this *Reynolds* case which
7 involved the racer -- the runner, who was banned. Then the
8 response was similar to NASCAR's. Well, if you let him run,
9 Judge, we're going to ban the other runners from racing
10 against him. And the court said you can't do that.

11 So this particular process that they followed,
12 indicates it's wrong. And it ought to be stopped at the
13 trial, also. But it needs to stop now, so that Mr. Mayfield
14 has an opportunity to proceed with his career.

15 All of this is discretionary, says NASCAR. We can
16 ban you because you got a crew cut. Or maybe they don't
17 like long hair. We can ban you for any reason. It's all
18 our discretion about whether you drive this race.

19 But the law is abundantly clear in every
20 jurisdiction, whether it's North Carolina or Florida or
21 anywhere else, that when you have discretionary power in a
22 situation such as this, you can't abuse your discretion.
23 You can't exercise your discretion in an arbitrary and
24 capricious manner to the detriment of the person that's
25 getting the result of this discretion.

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1 And we cite North Carolina law, the *Reynolds* case
2 as I just mentioned to you, which clearly stands for that
3 proposition.

4 Public policy, I really dealt with at the
5 beginning of this. They can't just make up a procedure.
6 And the public policy of this state, is that you give
7 someone charged with something, a chance to demonstrate you
8 made a mistake.

9 If this policy is left the way it is, there is no
10 remedy for Mr. Mayfield, absent a very expensive trial,
11 against a defendant that has limitless amounts of money,
12 apparently.

13 And he really doesn't have an opportunity to ever
14 get his Sample "B" tested by a SAMHSA lab in a pristine
15 condition.

16 Now, they sent the A and B samples that have been
17 in the care of Dr. Black and his company, to yet another lab
18 last week. And they filed an affidavit that said, we got
19 the same thing you got.

20 But actually if they read their own -- and it's a
21 SAMHSA lab. If they read their own rules, they wouldn't
22 have tested either one of them, because the seal's been
23 broken.

24 So there's no way here, absent your intervention,
25 for us to actually ever test a pristine "B" sample.

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1 So public policy cuts in favor of Mr. Mayfield
2 being given his day. And today is his day.

3 THE COURT: They argue that this would be a
4 mandatory injunction. What do you say about that?

5 MR. DIEHL: Pardon?

6 THE COURT: They argue that this would be a
7 mandatory injunction, which is disfavored. What do you say
8 about that?

9 MR. DIEHL: I'm not arguing with what the law
10 says. But I think these facts justify your intervention,
11 because they're overwhelming.

12 You can issue a mandatory injunction, I mean,
13 there isn't a ban on them. You can say to NASCAR, I'm
14 ordering his suspension rescinded. I'm granting that
15 injunctive relief. He is back where he was before the first
16 of May; period. We're not worried now about what it was,
17 keeping that secret, because it's been out for a long time.

18 But an injunction, returning him to the place he
19 was before they suspended him, is clearly within your power,
20 and is clearly supported on the record in this case.

21 It's July 4th weekend. Somehow that, that rings
22 true to me, as I talk to you, about asking you to correct a
23 wrong. Our whole country got founded on people objecting to
24 being told what to do with no chance for their own views to
25 be considered.

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1 And independence day for Jeremy ought to be today.
2 He ought to get his privilege to drive back. He's not a
3 government. We all know that. I mean, this isn't a case
4 involving a constitutional situation, but it is a case
5 involving fairness.

6 And I think as I read these cases, that's exactly
7 what you can do. Even with a private organization like
8 NASCAR. Because other courts have done it. It's got to be
9 reasonable. It's got to be applied reasonably. You can't
10 make up the process as you go along. Which is what they're
11 arguing to you.

12 Thank you.

13 THE COURT: If I understand you correctly, the
14 crux of your argument would be, that because NASCAR requires
15 the testing lab to be SAMHSA certified --

16 MR. DIEHL: Right.

17 THE COURT: -- that Mr. Mayfield and any other
18 driver has a reasonable expectation that the SAMHSA lab will
19 perform the procedures they are required to perform in order
20 to remain certified.

21 MR. DIEHL: Right. And they won't -- excuse me.

22 THE COURT: And they didn't do it.

23 MR. DIEHL: It's clear they didn't do it.

24 And their argument on the other hand is, we don't
25 have to do that. They say that flat out. That doesn't mean

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1 anything, the fact that it's a SAMHSA lab.

2 I mean, they can have a procedure -- although it's
3 not described in their substance abuse policy -- they can
4 have a procedure where you pee in a cup, and you go over and
5 you stick a reagent stick in it, like we did when we were in
6 high school in chemistry. And if it turns green, it's meth.
7 If it turns blue, it was just coffee. Then they could
8 decide coffee is banned, because it's a stimulant.

9 And we're gonna say now, after the fact, that if
10 you do coffee or you take, in this case, Claritin-D, then
11 you're violative of our drug policy, and we can take away
12 all the privileges that we have by contract with you,
13 because they're all discretionary anyway.

14 That just smells bad. And it stinks enough that
15 the court should intervene and say, you can't do that. I
16 don't care who you are, NASCAR. You can be concerned for
17 safety. Good. We're all concerned for safety.

18 You don't want drivers driving around on drugs.
19 Of course not.

20 But if you're gonna have a drug testing policy,
21 you've got to fairly advise the people that are going to be
22 tested of the process. Then you got to do it in a fair way,
23 so that they don't lose the things that Mr. Mayfield has
24 lost. Because we, just in our discretion, can do what we
25 want to do. We are the king. We are NASCAR.

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1 THE COURT: All right. Thank you.

2 We're going to, in view of the time that you have
3 expended, which is about 45 minutes, then in all fairness to
4 the defense, will allow 45 minutes for the defense to go
5 forward. And then you can have brief rebuttal.

6 So we will resume at 2:00. I regret having to
7 leave early, but if we don't leave early and get out there,
8 we are not going to get a seat.

9 MR. DIEHL: Can we leave our stuff in here?

10 THE COURT: You may absolutely leave your stuff in
11 here.

12 All right. Then we will be in recess until 2:00.

13 (Recess.)

14 THE COURT: All right. Sorry for the brief delay.
15 The funeral took a lot longer than I had anticipated.

16 All right. For the defense, NASCAR and other
17 defendants.

18 MR. DIEHL: Your Honor, before she begins --

19 THE COURT: Sir.

20 MR. DIEHL: We obtained yet another expert
21 affidavit, which we E-filed during the break. I have hard
22 copies --

23 THE COURT: May I see it, please?

24 MR. DIEHL: Yes, sir. One for the clerk and one
25 for the opposing counsel. May I approach?

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1 THE COURT: Yes. If you would give one to them.

2 MR. DIEHL: I have done that.

3 THE COURT: All right. We can hear from the
4 defense now.

5 MR. HENDRICK: Your Honor, may I be heard on the
6 affidavit before we start?

7 THE COURT: Yes.

8 MR. HENDRICK: We were provided that affidavit
9 about 10 minutes after 2:00.

10 There was an agreement between counsel for the
11 plaintiff and counsel for the defendant to exchange
12 affidavits in advance of this hearing. And then for the
13 plaintiffs to brief their position and the defendants to do
14 likewise.

15 This affidavit comes, obviously to us, with no
16 opportunity to study it, or no opportunity to discuss it,
17 with Aegis or NASCAR.

18 We do have Dr. Robert in the courtroom. And I
19 suppose we could respond to it with live testimony.

20 But it is not in accordance, in my understanding,
21 with our agreement, which we confirmed with your law clerk.

22 And I think it's inappropriate to submit an
23 affidavit that at 10 minutes after 2:00, we have absolutely
24 no opportunity to review, study or respond to, when that
25 wasn't the ground rules that were established.

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1 MR. DIEHL: Your Honor, they filed an affidavit,
2 same day on Thursday. I'm not disagreeing with the
3 representation that we made an agreement about that. We saw
4 their affidavit. The issues in Dr. Schueler's report -- and
5 they've attacked our experts, repeatedly.

6 The issue in Dr. Schueler's report is not a new
7 subject; it's proper procedures for drug testing. And he is
8 familiar with SAMHSA process.

9 I say that the materials are helpful to you in
10 making your decision. You can exercise your discretion --

11 THE COURT: I will receive the affidavit.

12 MR. DIEHL: Thank you.

13 THE COURT: All right, ma'am, you may proceed.

14 MS. MAHER: Good afternoon, Your Honor. My name
15 is Helen Maher. I represent NASCAR and Brian France in this
16 matter. My co-counsel will be addressing the facts about
17 the testing, as well as plaintiff's failure to show the
18 success on the merits.

19 Your Honor, this case is not about chocolate milk
20 or orange juice. This case is about a dangerous and
21 mind-altering drug, methamphetamine. NASCAR is to race
22 tracks, what law enforcement is to the public. NASCAR's
23 goal is to keep people safe, not to act as a capricious
24 king.

25 This hearing is about public safety. It's about

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1 the safety of the drivers, teams, and others who participate
2 in NASCAR events. It's about the safety of the millions of
3 fans that attend NASCAR events each year.

4 Mr. Mayfield's lawyers have spoken quite a bit
5 about the alleged irreparable harm Mr. Mayfield will incur
6 if a preliminary injunction is not issued.

7 But absent from their discussion is the real
8 irreparable harm in this case. And that is the serious harm
9 that can occur to the 42 other drivers on the track, the
10 hundreds of crew members, and thousands of fans, while a
11 drug user is driving on the track.

12 This is about a driver taking an illegal drug that
13 impairs his motor skills and judgment, and then getting into
14 a 3,500 pound car, and driving 120 miles an hour.

15 NASCAR has a strong interest in keeping its races
16 as safe as possible. The public has an interest in
17 protecting its citizens from unnecessary harm.

18 If Mr. Mayfield is allowed to race after testing
19 positive for methamphetamine, who will protect the public?
20 Who will protect the drivers? And who will protect the
21 fans?

22 At the end of the day, the question that this
23 court has to decide is this:

24 Is there a legal basis for putting Mr. Mayfield
25 back on the track to endanger all of the other NASCAR

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1 drivers and fans while this litigation is pending.

2 The answer is no.

3 Mr. Mayfield is seeking far more than just to
4 maintain the status quo. As you'll see in this slide, the
5 driver/owner agreement does not provide Mr. Mayfield with
6 any right whatsoever to participate in NASCAR events.

7 In fact, the contract that Mr. Mayfield signed,
8 says that the eligibility of every driver to participate in
9 NASCAR events, is subject to NASCAR's discretion.

10 Based on the contracts that Mr. Mayfield signed,
11 NASCAR does not need to have a reason to exclude him. But
12 here, NASCAR has a very good reason. He tested positive for
13 an illegal drug, and endangered the lives of everyone around
14 him. NASCAR had no choice but to suspend him. His
15 suspension was proper and it was substantiated by all of the
16 tests.

17 Plaintiffs basically want this Court to act as a
18 NASCAR appeal board. If the Court reverses the suspension,
19 the sport and NASCAR will suffer serious harm.

20 As my co-counsel will discuss, Mr. Mayfield has
21 failed to demonstrate that the plaintiffs are likely to
22 succeed on the merits of the claims.

23 Mr. Diehl told a very entertaining story today. I
24 was even entertained by it. But when you come into federal
25 court, you need facts and law, and he has neither. Here are

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1 some of the facts that he missed.

2 NASCAR does everything it can to keep their races
3 safe. They've installed safer barriers, which are steel and
4 foam walls, so that if cars hit them the impact is lessened.
5 They've required drivers to wear head and neck restraints.
6 They've had teams install roof flaps so that the cars cannot
7 become airborne and go into the stands. And they've
8 implemented head gear and speed limits for the pit area.

9 NASCAR has had a drug testing policy in place for
10 20 years. It wasn't some willy-nilly policy. NASCAR had
11 spoken to other sport leagues, they spoke to experts, and
12 hired a world-renowned testing lab.

13 NASCAR has a testing policy for two reasons:

14 First, to protect the public from harm if someone
15 were to ingest drugs and get on the track.

16 Two, to prevent anyone from having a competitive
17 edge.

18 In 2008, NASCAR revised its substance abuse policy
19 to include random drug testing. It's important to note that
20 the drivers have encouraged NASCAR to do more testing and to
21 do random testing, as well.

22 As Your Honor pointed out this morning, along with
23 its substance abuse policy, NASCAR issued a non-exhaustive
24 list of prohibited substances, and chocolate milk is not on
25 this list, but methamphetamine actually is.

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1 THE COURT: But what I think you denigrate his
2 point, and have failed to do so successfully. His point is,
3 and you may reply to this.

4 What is to preclude NASCAR from ex post facto
5 determining to ban anything?

6 MS. MAHER: Well, I think given the fact the sport
7 is very dangerous. So they don't really know what types of
8 drugs are actually going to make somebody not be able to
9 drive safely, so they can't come up with a conclusive list.
10 It has to be fluid. It has to be able to --

11 THE COURT: That's not quite responsive.

12 I can understand that the panoply of pharmacopeia
13 can change, and that a drug may come new on the scene.

14 His point was, that there is nothing to preclude
15 NASCAR from, ex post facto banning something, before anybody
16 know's its dangerous. What do you say to that?

17 MS. MAHER: I think that as soon as NASCAR
18 realizes something is dangerous, they alert the drivers.
19 But ex post facto, I mean, at the end of the day, the goal
20 is to make sure everybody is safe.

21 The issue here is, methamphetamine has always been
22 banned, it's not something new. And that argument is a red
23 herring that something could be banned ex post facto.
24 Methamphetamine has always been on the list.

25 THE COURT: Okay.

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1 MS. MAHER: The first person to violate NASCAR's
2 substance abuse policy was a member of Mr. Mayfield's team.
3 At the time, Mr. Mayfield issued a press statement saying
4 that he appreciated NASCAR's policy. Yet now he contends he
5 doesn't know what it is, and he doesn't know what was
6 banned.

7 Mr. Mayfield was selected to be randomly tested,
8 and he provided a urine sample to a collector, who happens
9 to be a former FBI special agent. Those tests came back
10 positive for methamphetamine and amphetamine.

11 Mr. Mayfield exercised his due process rights at
12 that time, and asked that the Sample "B" be tested. After
13 the test, Mr. Mayfield signed the lab's custody and control
14 form.

15 The form indicates that he provided a urine
16 sample. He did not adulterate it. And that each specimen
17 bottle was sealed with a tamper-evident seal in his
18 presence. And that's the document that's on display right
19 now, Your Honor.

20 The gist of the story is, that after he failed the
21 drug test, Mr. Mayfield tried to explain it away by saying
22 that it was due to his ingestion of Adderall and Claritin-D.

23 Dr. Black indicated to Mr. Mayfield at that time,
24 it was not possible that the Adderall and Claritin could do
25 that, given the sophisticated test that he uses.

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1 Mr. Mayfield has not told the Court that his
2 diagnosis of ADHD, which he was prescribed the Adderall, was
3 actually by a physician's assistant, not his regular
4 physician. In fact, not a physician at all.

5 This is a spa that claims on its web site, its
6 services include laser hair removal, Botox injections,
7 facials and acne treatment. It does not identify that its
8 services include diagnosis of neuro-behavioral disorders,
9 such as ADHD.

10 Each year Mr. Mayfield signs a medical form that
11 states, I also certify that should there be any change in my
12 health status during the racing season, that I will inform
13 the medical liaison coordinator's office.

14 Contrary to Mr. Mayfield's assertions, NASCAR's
15 not concerned with Mr. Mayfield's use of Claritin-D.

16 Mr. Mayfield followed proper procedure with
17 respect to Claritin-D. In June of 2004 he told NASCAR he
18 was taking Claritin-D. But for some reason he hid the fact
19 that he was taking Adderall.

20 It's important to note that NASCAR requires
21 disclosure of any drugs by the drivers, so they can meet
22 with the NASCAR doctors to talk about whether the levels are
23 safe and whether they can drive with them. Adderall by
24 itself, and in certain amounts, is not necessarily a banned
25 substance.

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1 Since filing this case, Mr. Mayfield has been
2 complaining that all he wanted was an independent lab to do
3 the test. And NASCAR offered that to him last week. Did
4 Mr. Mayfield take up NASCAR's offer to have the sample
5 tested again? No. He said he didn't want to.

6 Well NASCAR's attorneys had it tested anyway, and
7 it tested positive for methamphetamine. And it came back
8 virtually identical to levels of methamphetamine that the
9 lab found.

10 This, again, shows that the results are not the
11 product of Adderall and Claritin. Because that lab only
12 tested for methamphetamine.

13 The bottom line now, is that four tests have been
14 conducted. And all four tests show that Mr. Mayfield
15 ingested methamphetamine and tested positive for it.

16 Mr. Mayfield does not want NASCAR's help. He
17 doesn't want to change his behavior. He wants this Court to
18 order NASCAR to let him race. And he doesn't care who he
19 has to hurt in the process.

20 But it is NASCAR's responsibility to care who he
21 hurts. And while this litigation is pending, NASCAR has a
22 duty to prevent him from injuring anyone at a NASCAR event.

23 Plaintiffs have failed to meet their burden in
24 establishing that a preliminary injunction is warranted in
25 this matter.

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1 As Your Honor is aware, preliminary injunctions
2 are extraordinary remedies, to be issued only in limited
3 circumstances. We don't believe that this is one of those
4 circumstances.

5 As an initial matter, Mayfield Motorsports is not
6 entitled to injunctive relief. MMI has been continued to
7 race. It has not been suspended, but has chosen not to
8 race. Therefore, its injury has not been caused at the
9 hands of NASCAR. It's been self-inflicted. And case law
10 shows that if you have a self-inflicted injury, it does not
11 constitute irreparable harm.

12 In this case, MMI can and did use another driver.
13 After Mr. Mayfield was suspended, they used J.J. Yeley. And
14 it wasn't that they had to use a second rate driver, they
15 actually used the driver that statistically has fared better
16 than Mr. Mayfield.

17 Mr. Mayfield has failed to show irreparable harm.
18 First, his argument is based on harm to reputation and
19 publication of the drug results.

20 Mr. Mayfield's test results have been published in
21 national media. He himself disclosed the drug to the sport
22 in papers which can be accessed by anyone with an internet
23 connection and a computer.

24 The claimed loss of advertisements and
25 sponsorships, do not constitute irreparable harm. They all

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1 happened, if they happened at all, in the past.

2 The irreparable injury, injury must concentrate on
3 current threats, not past ones. Here, no injunction can
4 remedy the alleged harm to Mr. Mayfield's reputation,
5 because he alleged that it occurred on May 15th, 2009, as a
6 result of NASCAR announcing his suspension.

7 And even if Mr. Mayfield did suffer any
8 reputational harm, there is no risk of further harm, because
9 Mr. Mayfield's suspension, and the general facts of it are
10 widely known.

11 There is no irreparable harm, because the
12 driver/owner agreement may be terminated in NASCAR's
13 discretion. That was the first slide that you saw this
14 afternoon.

15 THE COURT: Is there any, any limitation on that
16 discretion?

17 MS. MAHER: I think that NASCAR has always
18 exercised that discretion in a reasonable manner as a
19 business.

20 THE COURT: Again, that's not responsive.

21 If your answer is there is none; step up and own
22 it.

23 MS. MAHER: I think that the.

24 THE COURT: I mean, if that's your answer, step up
25 and own it.

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1 MS. MAHER: Okay. The fact of the matter is, that
2 it is always subject to NASCAR's sole discretion.

3 THE COURT: All right. Thank you.

4 MS. MAHER: As I discussed earlier, Mr. Mayfield
5 is asking this Court to give him a right that he doesn't
6 have. NASCAR has the right to terminate Mr. Mayfield or any
7 other driver in NASCAR's sole discretion. In part, because
8 the owner/driver agreement is essentially a contract at
9 will. It's terminable at will by either party.

10 Mr. Mayfield has also demonstrated that he does
11 not have to perform under it either. So it's not just
12 NASCAR who can decide not to perform under it. It's also
13 Mr. Mayfield who has chosen to do that in certain
14 circumstances.

15 Plaintiff cite the *Reynolds* case, and that's
16 distinguishable for several reasons. In that case the
17 athlete actually lost his sponsorships. Here, MMI did not.

18 And you will see at Exhibit Five to our brief,
19 that SMALLSPONSOR.COM, which claims to be his primary
20 sponsor, states on its web site that it will stick with MMI,
21 notwithstanding Mr. Mayfield's suspension.

22 In the *Reynolds* court, it was easy to grant an
23 injunction, because there was no danger of injury to other,
24 he was a runner, sprinter. Here, you have somebody on
25 drugs, getting into a 3500 pound car next to 42 other

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1 people, in front of and near -- near thousands of fans.

2 In *Reynolds* there were problems with the testing.
3 In fact, they found through experts that it wasn't even the
4 runner's sample. The two samples did not match at all.

5 Here, the best that Mr. Diehl can do is say,
6 there's a possibility something happened. But he has no
7 evidence of anything. He doesn't suggest that anything was
8 wrong. He just says, they didn't follow the testing
9 procedures.

10 Plaintiff also heavily rely on *NFL PAB NFL* case,
11 which is also distinguishable. Unlike the *NFL* case, which
12 was about steroids, this is actually about mind-altering
13 illegal drugs. It's not just someone getting on the field
14 with a couple of other people. This is someone getting into
15 this race car.

16 In the *NFL* case, none of the plaintiffs actually
17 tested positive for steroids. They tested positive for a
18 substance that wasn't even listed as being banned. Unlike
19 here, Mr. Mayfield ingested a banned and illegal substance.

20 The primary factor underlying *NFL's* finding of
21 irreparable harm, was the limited duration of a NFL player's
22 career. Today the average age of an NFL player is 27.
23 That's quite different for NASCAR, where several drivers are
24 driving into their fifties.

25 Mark Martin, who has more victories this year

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1 alone, just turned 50 in January. Joey Lagano, who just won
2 last week, is 18. So you have at least a 32 year career
3 span there.

4 But I think most importantly is the fact that
5 Mr. Mayfield admitted in his affidavit, that he expects to
6 have another 10 years to his career.

7 And I think even the most important factor from
8 the *NFL* case, and that's a page 983, is that it's stated
9 that it was only entertaining, that preliminary injunction
10 motion, because of the highly unusual facts in that case.

11 And here there are no highly unusual facts. In
12 fact, the best that we have again, is that there's a
13 possibility that something must have gone wrong, but there's
14 no detail to what might have happened.

15 To the extent Mr. Mayfield has any damages that
16 can be compensated by money, he talks about having cash flow
17 problems, being forced to borrow money, he wants to race
18 again, out of fear for what's going to happen to his wallet,
19 basically.

20 He's also failed to show that irreparable harm is
21 actual and imminent. He has to make a clear showing of
22 that. He has to make sure that it's not speculative.

23 It's impossible for plaintiffs to prove any
24 imminent harm, particularly given that Mr. Mayfield's
25 participation in NASCAR is subject to NASCAR's sole

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1 discretion.

2 This year alone, Mr. Mayfield has tried to become
3 eligible for 11 races, but only has made it to race five
4 times. So for any given race, it's more likely than not
5 that he's not going to make it.

6 Plaintiffs contend that defendants will suffer no
7 harm if a preliminary injunction is issued. As I already
8 discussed some of the safety issues, here are a few more.

9 For NASCAR, it is a family-friendly sport. If a
10 methamphetamine user is permitted to race in NASCAR events,
11 families will likely not want to bring their children to see
12 the races, or support a sport that generally has had a more
13 wholesome reputation than other sports. And it will be
14 tarnished if people think that NASCAR allows drug users to
15 race.

16 The other harm that will happen is the fact that
17 the drivers are relying on NASCAR to safeguard them against
18 unnecessary harms. They expect NASCAR to minimize their
19 risks.

20 One of the expectations that they have, is that
21 NASCAR will prevent drivers who are on drugs from being on
22 the track.

23 Some of NASCAR's top drivers, Jimmy Johnson and
24 Jeff Gordon, submitted affidavits in this case and stated,
25 "I am not willing to put my life at risk, driving a race car

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1 on a NASCAR track, with drivers testing positive for drugs,
2 that diminish their capacity to drive a race car.

3 "I support NASCAR's substance abuse policy, and
4 depend on NASCAR to prohibit drivers who don't abide by the
5 policy from racing."

6 Mr. Mayfield's colleagues further state, "If
7 drivers are on the track in violation of NASCAR's substance
8 abuse policy, it presents serious questions as to whether or
9 not it makes sense for me to put my life at risk."

10 So without drivers to race, NASCAR will be in
11 breach of a host of contracts.

12 NASCAR is a sanctioned body for its sport, has
13 identified Mr. Mayfield as a danger to others. And this
14 determination should not be undone at the judicial level.

15 Issuing an injunction will strip NASCAR of its
16 authority to maintain the integrity of the sport and to keep
17 it safe.

18 In effect, every time a driver doesn't like a
19 penalty that he receives, he will race to the court and he
20 can get it undone and he can get it back on the track,
21 regardless what type of drugs --

22 THE COURT: How fast can Aegis test a urine
23 sample?

24 MS. MAHER: It takes approximately four days, Your
25 Honor. They could -- I assume that plaintiff's counsel is

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1 going to argue to do an on site immediate test. But those
2 have a high incidence of false positives.

3 So in effect, you would be accusing a lot of
4 people of doing drugs, and it wouldn't be correct. Because
5 the tests are not sophisticated enough, and they're not
6 sensitive enough.

7 THE COURT: Would it not be possible for you to
8 test Mr. Mayfield before he attempts to qualify in anything
9 and determine whether he's a habitual methamphetamine user?

10 MS. MAHER: No, Your Honor, for two reasons.
11 Number one, is that the tests -- if you want a real
12 sophisticated test, that's going to examine the entire
13 spectrum of drugs, it does take about four days.

14 THE COURT: You only have one you're looking for.
15 That's what you're basing all of this on.

16 MS. MAHER: That's correct, Your Honor. It's
17 still my understanding that it still will take approximately
18 four days for that.

19 THE COURT: Four days.

20 MS. MAHER: Well, no other sports league uses the
21 same day on test -- testing devices. It's just the way the
22 technology is right now.

23 The public interest has -- the public has an
24 interest in safety requirements, as well. In *Snap-N-Pops*
25 *versus Browning*, the Court held that the movant's interests

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1 were outweighed by the public's interest in maintaining the
2 safety of its citizenry.

3 Similarly here, the public interest and the safety
4 of the drivers, teams and fans, warrants that this
5 injunction not be issued.

6 The State of North Carolina prohibits its
7 residents from operating machinery while they've ingested
8 illegal drugs, and even in possession of illegal drugs. And
9 the reason the state has those statutes, is to protect its
10 citizens from harm.

11 Likewise, NASCAR has its substance abuse policy to
12 protect the drivers in the race, as well as to protect the
13 fans.

14 NASCAR has prevented Mr. Mayfield from continuing
15 to endanger the lives of everyone around him on that track.
16 If he is allowed to race again, while this litigation is
17 pending, it is possible he will end up hurting or killing
18 someone.

19 It is this irreparable harm, the possibility of
20 serious injury or death, that the Court should consider when
21 evaluating Mr. Mayfield's request for a preliminary
22 injunction, not the alleged damages to his finances.

23 THE COURT: All right. You've used up a half an
24 hour. You've got 15 minutes left.

25 MR. HENDRICK: Thank you, Your Honor.

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1 Your Honor, I would like to call to the Court's
2 attention that the France family has been and continues to
3 be the owner of the NASCAR brand through a Florida
4 corporation.

5 That's important in this case, because its stock
6 is not publicly traded. It's not a federal agency. It's
7 not associated with the state government.

8 Drivers are licensed for the privilege to compete
9 for points and prize money won and awarded under NASCAR's
10 rules.

11 Drivers are not employees of NASCAR, they are
12 licensees. And as a result, Mayfield is going to have to
13 show the Court some standard which was breached -- a duty
14 which was owed, and a standard which was breached, in order
15 to qualify it under the test of likelihood of success on the
16 merits for a preliminary injunction.

17 What we heard at the TRO hearing in state court,
18 and what we have heard today in federal court, is that the
19 Plaintiff, Mayfield, seeks to avoid the stark results of his
20 urine testing positive for methamphetamine, by presenting to
21 the Court the standard of the Federal Workplace Guidelines.
22 That's what we heard Mr. Diehl talk about.

23 There are three reasons, Your Honor, any one of
24 which is sufficient to avoid the Federal Workplace
25 Guidelines as a standard.

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1 But the first and foremost of those is that the
2 Federal Workplace Guidelines are reported in 69, in the Code
3 of Federal Regulations.

4 And in it, under Section 1.1, there is a provision
5 that says, "These Federal Workplace Guidelines are only to
6 be applied to executive agencies, uniformed services and
7 federal governments, government employing agencies". That's
8 it, Judge.

9 So the standard that is being purported to be
10 asserted, is not applicable in a private scenario.

11 I would point Your Honor's attention to the Fourth
12 Circuit case of *Cooper versus Lab Corp*. It's decisive on
13 this point, Your Honor.

14 In that case, a former employee sues Lab Corp
15 alleging negligence, defamation and intentional interference
16 regarding urine tests.

17 The Court says, and I'll quote from page 379.
18 "The Guidelines do not, however, govern a laboratory's
19 duties to private employers through -- though private
20 employers must be notified if a laboratory loses its
21 certification."

22 So the bottom line, we have the Fourth Circuit
23 telling us, and following Section 1.1 of the Code of Federal
24 Regulations saying that applying these Guidelines -- and
25 they are the only Guidelines, Your Honor, which Mr. Diehl

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1 has suggested as imposing a duty upon NASCAR -- that these
2 Guidelines are inapplicable.

3 Now, I said three items. There are three items,
4 Your Honor. And while the first two are certainly
5 conclusive on this Court, being statutory as well as case
6 law from the Fourth Circuit, I would just like to point Your
7 Honor's attention to an affidavit which we filed in
8 connection with various affidavits that were filed in this
9 case. And this affidavit is by Kenneth Edgell.

10 Mr. Edgell is currently the senior policy adviser
11 to the American Medical Review Officers to DOT and non-DOT
12 drug tests. However, prior to that time, he was the U.S.
13 DOT employee for seven years. He managed the DOT's drug
14 testing programs for 33,000 federal employees. And for
15 three years, he was the director of The Office of Drug and
16 Alcohol Policy Compliance.

17 Basically his affidavit says that he is the
18 primary author of the Federal Workplace Drug Testing
19 Procedures. His affidavit is before you.

20 And I would point Your Honor's attention to
21 paragraphs seven and eight of that affidavit, in which Mr.
22 Edgell says, "the NASCAR substance abuse policy does not
23 follow the SAMHSA Mandatory Guidelines for Federal Workplace
24 Drug Testing Programs, nor is it required to do so. In
25 fact, the mandatory Guidelines were not intended to be

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1 applicable to any agency other than those specifically
2 stated in paragraph six above."

3 Those limited to the three that I mentioned, Your
4 Honor.

5 "The mandatory guidelines specifically prohibit
6 SAMHSA -- specifically prohibit SAMHSA-certified
7 laboratories from representing that non-federal testing has
8 been conducted according to SAMHSA federal requirements.

9 "I am aware that Aegis Sciences Corporation is a
10 SAMHSA-certified laboratory. However, in its testing
11 procedures for NASCAR, a private company", Your Honor,
12 "Aegis is not subject to SAMHSA Mandatory Guidelines.

13 "Further the SAMHSA mandatory guidelines
14 specifically prohibit the testing for the many drugs of
15 concern addressed in NASCAR's substance abuse policy."

16 In other words, if we follow the Mandatory Federal
17 Guidelines, which are being urged on this Court as a
18 standard, we would find that the many drugs that NASCAR
19 seeks to test for, in order to keep its drivers, its crews,
20 its officials, and the public safe, would not be able to be
21 on the list.

22 So Your Honor, on those three counts, I suggest to
23 this Court, and I argue to this Court, that no standard has
24 been presented to the Court, for which the plaintiffs in
25 this case would be able to prove on the merits, a breach of

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1 duty. There is none presented by them, and it is their
2 burden to do so.

3 Likewise, Dr. Black's affidavit speaks to the same
4 issues.

5 And then, trying not to beat a dead horse here,
6 likewise, the MRO manual for Federal Workplace Drug Testing
7 is also inapplicable. Because that MRO manual specifically
8 relates to federal employee drug tests.

9 So what we have here, Your Honor, is a flurry of
10 activity to try and convince the Court that a standard has
11 been presented, when in fact a standard has not been
12 presented.

13 The plaintiff's primary premise is based upon the
14 Workplace Guidelines. So what of it at that point then?
15 What is at the heart of Mayfield's argument to this Court
16 for a preliminary injunction. What is at the heart of it?

17 I believe and suggest to Your Honor what's at the
18 heart of it, is that the "A" and "B" samples were tested by
19 the same laboratory, by Aegis Science Corporation. I think
20 that's what's really got them in a knot.

21 Of course, probably the thing that's got them in a
22 knot more than anything else, is that Mr. Mayfield tested
23 positive for methamphetamine. But --

24 THE COURT: How does Mr. Mayfield contest a
25 false-positive? What remedy does he have, if any, to

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1 attempt to deal with that?

2 MR. HENDRICK: Your Honor, there is no remedy for
3 him to contest a false-positive, until he sees the testing
4 results. And from those testing results, if he can
5 determine that machines were not calibrated correctly, if
6 tests were not properly prepared, under the proper
7 supervision, under the proper controls, the screening that
8 takes place before these tests are ever done, Your Honor,
9 this is a multi-stage procedure.

10 And in fact, we have given, voluntarily, before
11 discovery commenced, approximately 400 pages of these
12 results, detailed analysis of exactly what was screened for
13 and tested for.

14 Your Honor, if there are mistakes with respect to
15 that data, let's see it. We haven't seen it. What we have
16 seen is an argument that Adderall and Claritin-D, when taken
17 together produce massive amounts of methamphetamine in the
18 human body, which is a statement that is untrue, Your Honor.

19 And I point Your Honor to Dr. Black's affidavit on
20 page six, paragraphs 35 and 36, where he addresses this very
21 issue.

22 Now, I have not had time to study the document
23 that Your Honor's read. I don't know who did it. I don't
24 know what it says. But I did glance at one paragraph that
25 says that you can take Claritin-D, and you can take

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1 Adderall, and as a result you can have methamphetamine in
2 your body, if that's a correct statement.

3 But in any event, we do not believe that that is
4 fact, scientific. And we do not believe it is demonstrable.

5 We have Dr. Black who will state that. We have a
6 medical doctor, Dr. Aukerman who is our MRO who will state
7 that. And also Dr. Tim Robert. All of whom eminently
8 qualified, world renowned.

9 Basically the question is, it seems to me,
10 returning to the *Cooper* case, Your Honor, the question is,
11 what is the standard. And I think that may be what Your
12 Honor is asking. And I think on the same page, page 379 of
13 the *Cooper* case, we get a very clear answer from the Fourth
14 Circuit.

15 It says: "In professional negligence causes of
16 action, a plaintiff must establish that the professional
17 failed to conform to the generally recognized and accepted
18 practices in its profession". A clear statement.

19 And, Your Honor, what are the facts before you
20 with respect to this affidavit. Dr. Black's affidavit
21 specifically addresses this standard.

22 And that among sports organizations in the United
23 States of America, he states, "It is common for the "B"
24 sample to be tested in and by the same laboratory".

25 What support do we have for that in his affidavit?

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1 Both the World Anti-Doping Agency and the U.S.
2 Anti-Doping Agency require that the same laboratory be used,
3 Your Honor. I want to say that again, if I may. The same
4 laboratory be used, for the testing of the "A" and the "B"
5 sample. These are two leading agencies in sports drug
6 testing in the world.

7 In addition to that, other sports organizations
8 that require the same laboratory to be used for the testing
9 of the "B" sample include the National Football League, the
10 National Hockey League, Major League Baseball, the Indy
11 Racing League. And that's among others, Your Honor.

12 And A fascinating argument to me was made by Mr.
13 Diehl. He said, oh, well, don't pay any attention, Your
14 Honor, to the NFL. Don't pay any attention to the National
15 Hockey League or Major Baseball League. Gosh, those are all
16 collectively bargained agreements.

17 Well, Your Honor, it seems to me that that is the
18 exact support for the argument. If they're collectively
19 bargained agreements, if the players who are going to be
20 tested, agree to same laboratory testing in those
21 circumstances, and you have a wide range of people, much
22 larger group than our group, it seems to substantiate
23 exactly what *Cooper* proposes as the test, Your Honor.

24 But lest we leave collective bargaining agreements
25 and return to private agencies, we find that the Indy racing

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1 league is exactly like NASCAR. And it's one of those groups
2 that uses same laboratory testing.

3 So whether it's collectively bargained or whether
4 or not it's privately owned and not collectively bargained
5 and not unionized, we find the same standards and rules
6 across the spectrum of sports.

7 THE COURT: Five minutes.

8 MR. HENDRICK: Thank you, sir. I appreciate that.

9 I believe that there is a failure to present the
10 Court with a standard from which the Court can say I see the
11 standard, I see a breach of duty, and I see a likelihood of
12 success on the merits. And it does not exist.

13 I will point the Court's attention, if I may, to
14 the two affidavits that were filed in connection with the
15 plaintiff's expert testimony.

16 One -- you will have to forgive me, I can't
17 pronounce this it's Janine S. Arvizu -- or something like
18 that.

19 And in this affidavit she states on chain of
20 custody, which I want to address in my last two minutes.

21 "The urine sample cup that Mr. Mayfield was
22 instructed to use was from a cluttered table top.
23 Mr. Mayfield was not instructed to witness the sample being
24 split into two sample bottles, the placement of the labels
25 and seals on each bottle. Mr. Mayfield was directed to two

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1 initial samples with adhesive backings, but he didn't
2 witness the placement of those with the specimen."

3 She then goes on to say, as part of the basis for
4 her opinions that "Aegis is expected to conduct NASCAR
5 testing in accordance with technical requirements and
6 quality standards established for SAMHSA laboratories for
7 certification."

8 And in other words, "because NASCAR requires the
9 testing laboratory to be SAMHSA certified. And because
10 Aegis and NASCAR have not identified any other standards to
11 follow, therefore SAMHSA Guidelines should be used when
12 testing urine."

13 Your Honor, there is no support for that. There
14 is no basis for that conclusion. But more particularly, the
15 premise that she is using to draw her subsequent conclusions
16 is wrong, it's flawed, as we have just shown by looking at
17 the statute and Fourth Circuit.

18 Running along, Your Honor, I want to call to the
19 Court's attention, Mr. Plotnick's affidavit, a gentleman
20 submitted as an expert for Mayfield.

21 And with respect to Plotnick's affidavit, he also
22 says, on page two of eight, Your Honor, that "Guidelines and
23 procedures set forth policy required to be followed by its
24 certified labs in taking, processing, testing and reporting
25 results for various drug tests. I understand that

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1 Dr. Black, a representative of Aegis Science Corporation,
2 the laboratory that tested Mr. Mayfield's urine sample, has
3 admitted that Aegis complies and utilizes the guidelines and
4 procedures of every specimen test, including the test
5 performed by Mr. Mayfield's specimens."

6 That is, of course, Your Honor, untrue. Where we
7 to do that, we would be in violation of the Code of Federal
8 Regulations. And of course it is not true.

9 Therefore, all the rest of his conclusions are
10 based on a faulty premise, that we either should or must
11 follow the Federal Workplace Guidelines.

12 I suggest that in these two affidavits, because of
13 the flawed basis of them, Your Honor, I suggest there is no
14 evidence that the plaintiff has offered to this Court, of
15 likelihood of success on the merits.

16 And more particularly, when we look at the five
17 other affidavits that have been filed in this case, along
18 with Mr. Plotnick and Ms. Janine, we find that they say,
19 gosh, I looked at Jeremy and he looked fine to me. That's
20 what the affidavits say. I suggest to Your Honor, that that
21 is evidence with regard to the ingestion of methamphetamine.

22 I would also suggest to Your Honor -- and there is
23 one piece of evidence that no methamphetamine was ingested
24 by Jeremy Mayfield; it's his affidavit. He says so.

25 Now, Your Honor, in the courts of this land,

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1 federal and otherwise, if you can come in, take scientific
2 testing of sports organizations and trump it simply with an
3 affidavit that says, gosh, I didn't do it, then we will have
4 an onslaught of athletes, employees and others to get TRO's
5 and preliminary injunctions, the like of which will be a
6 large flow.

7 That's not what the law provides. That's not the
8 standard that must be shown. And we need to see a standard
9 from the plaintiffs that they intend to proceed on that is
10 lawful.

11 Finally, Your Honor, I just -- I realize I'm just
12 about out of time, if you indulge me --

13 THE COURT: I'm indulging you now. You are out of
14 time, but go ahead.

15 MR. HENDRICK: All right, sir.

16 My final point that I would like to make to the
17 Court is that Thomas L. Carter's affidavit, he was the
18 collector on the scene. We see in the verified complaint,
19 and we see in the brief, the allegation that Mayfield didn't
20 see the urine collection. He didn't see it occur.

21 But, Your Honor, he stated that, and I quote --
22 let me see if I can read it here, it's a little bit easier.

23 "I certified that I provided my urine specimen to
24 the collector. That I have not adulterated it in any
25 manner. That each specimen bottle used was sealed with a

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1 tamper-evident seal in my presence. And that the
2 information provided by this form and on the label affixed
3 to each specimen bottle is correct."

4 That's his certification.

5 Now, Your Honor, he makes a different
6 certification in his verified complaint.

7 I suggest to the Court that someone's going to
8 have to decide whether or not Mr. Mayfield was correct when
9 he drew his verified complaint and he knew he'd been
10 suspended for being caught with methamphetamine being found
11 in his body.

12 Or was he correct when he certified that he saw
13 all those things to the collector, an FBI agent with 26.5
14 years of experience, a special agent in Washington, D.C. and
15 Virginia.

16 Your Honor, I think that as we look at the facts
17 of this case presented to date by the plaintiff, there is no
18 evidence, credible evidence, on which this Court can issue a
19 preliminary injunction.

20 And thank you for your indulgence.

21 THE COURT: Thank you.

22 Mr. Diehl, do you wish to be heard in rebuttal?

23 MR. DIEHL: Yeah. Briefly, please, Your Honor.

24 I wrote down, what is the standard that guides
25 NASCAR, other than what they decide it is after the fact.

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1 What's the standard.

2 You asked the lawyers to tell you what the
3 standard is. They don't have an answer. They have a
4 procedure that has no standard, according to them, and
5 allows them to deprive someone with no opportunity -- as you
6 asked, as you ask them to own it -- no opportunity for
7 Mr. Mayfield to prove they're wrong. None. It's rock along
8 with us. Because we say it's so, therefore it's so. That
9 cannot be the law. They get to decide the standard. And
10 they can make the standard what they want it to be today or
11 tomorrow or the next day.

12 We entered into a contract with them to race. We
13 entered into a contract with them to abide by their drug
14 policy. They have a drug policy that requires a SAMHSA lab.
15 It must be a SAMHSA lab. We are entitled to believe and
16 rely that they'll handle the testing pursuant to the law.
17 And they basically admit they don't.

18 And that's caused Jeremy Mayfield irreparable
19 harm. It couldn't be clearer that the man has no remedy
20 whatsoever; that itself is irreparable harm.

21 He can try the case, they say. He can spend a
22 million dollars to try to show that the lab work was wrong.

23 But the point they continually miss, is that there
24 isn't any opportunity for him, at any early stage in the
25 proceedings to challenge their findings.

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1 They admit, they take the "B" sample and they
2 spoil it. And the rules of SAMHSA is that you don't test a
3 spoiled sample. I don't care what it's got in it.

4 THE COURT: What do you say about his observations
5 that they are not permitted to follow the Federal Workplace
6 Policy.

7 MR. DIEHL: Well, I say that's a wrong
8 interpretation of their own rules.

9 It's like he tells you the World Anti-Doping
10 Agency, WADA, doesn't require an "A" and "B" sample, and
11 doesn't permit Mr. Mayfield to decide where the "B" test is
12 made.

13 But if you read the rule at page -- rule 7.2, the
14 Sample may be -- the Sample "B" analysis, the schedule,
15 date, time and place of the Sample "B" analysis, if the
16 athlete" -- they're talking about athletes -- "chooses". He
17 gets to choose. Which is directly contradictory to what
18 he's telling you and what his expert says is the rules. We
19 don't operate under SAMHSA, we operate under WADA.

20 And the doping -- the doping testing under any
21 factual circumstance that's reasonable, requires an
22 opportunity to challenge it at some early point in the
23 process. And they've eliminated that. And they did it on
24 purpose.

25 And the business about the -- somehow we could say

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1 this over and over and over again the same way, you haven't
2 established a standard, avoids the reality that they don't
3 have a standard that we can establish, except by relying on
4 the documents that we sign. That's all we know that we can
5 do.

6 The presentation proves nothing contradictory to
7 what Mr. Mayfield has shown, Your Honor.

8 He's shown irreparable harm. He couldn't show it
9 any more. He's shown that the harm to him without an
10 injunction, is greater than the harm to them if the
11 injunction is granted. He's shown that they never had a
12 standard. That he's entitled to the relief on the merits of
13 his claim.

14 And my God, the public policy that this woman and
15 this man talk about, that he's driving around a track at
16 200 miles an hour endangering drivers. What if he's not
17 endangering anybody, because he hasn't taken any drugs.

18 I mean, their premise is bargained on the
19 presumption he's guilty.

20 THE COURT: Tell me about that North Carolina
21 Statute.

22 MR. DIEHL: 95-230. The public policy of North
23 Carolina requires drug testing just like we say it ought to
24 be. It requires the "B" test by a separate independent lab,
25 and says so.

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1 And if you read that Industrial Commission
2 opinion, it says it there.

3 "The drug testing guidelines are strikingly
4 similar to the drug test authorized pursuant to 95-230."

5 So that's North Carolina Guidelines.

6 "The General Assembly, 95-230, "provides that
7 individuals should be protected from unreliable and
8 inadequate examinations and screening for controlled
9 substances."

10 So the General Assembly finds that the employees
11 who want to test -- the employers who want to test their
12 employees, must do so in accordance with the statute.

13 The statute then creates the twin in Section F on
14 232-F, "Retesting of positive samples. The examinee shall
15 have the right to retest a confirmed positive sample at the
16 same or another approved lab. The examiner, through the
17 approved laboratory, shall make all confirmed positives" --
18 the rest of that is not really helpful.

19 But me, as the person that's found on Sample "A"
20 to have a positive test, can require it be tested by a
21 separate lab, the "B" sample. And we can not do that here,
22 ever.

23 So I ask Your Honor to rule, as I believe the
24 record requires, notwithstanding the pomposity of the NASCAR
25 people that say, we can do anything we want to do and it's

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1 tough luck. I don't think that's the law. That's not what
2 courts are for.

3 I appreciate you --

4 THE COURT: We're going to take a 15 minute
5 recess. I will return in 15, maybe 20 minutes, and I will
6 issue an order.

7 (Recess.)

8 THE COURT: All right. Good afternoon, counsel.

9 I've heard the arguments of the parties, I've
10 reviewed the briefs, the evidence submitted. And I'm now
11 going to make a ruling on Motion for Preliminary Injunction.

12 The standard for issuance of a preliminary
13 junction is the balance of hardship test, stated in the
14 *Blackwelder Furniture Company v. Seilig Manufacturing*
15 *Company* 550 F.2d 189. It is the Fourth Circuit, basically
16 seminole test on balance of hardships.

17 Also *Rum Creek Coal Sales V Caperton* and *Direx*
18 *Israel, Ltd.*, both of which are standards in the field.

19 There are four tests that the Court must apply in
20 order to determine whether an injunction is to be issued or
21 not.

22 The first two are the most critical:

23 First, is the likelihood of irreparable harm to
24 the plaintiff without the temporary injunction.

25 Second, the likelihood of harm to the defendant

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1 with the injunction.

2 Third, the plaintiff's likelihood of success on
3 the merits.

4 And fourth, the public interest.

5 The movant bears the burden of establishing that
6 each of the four factors supports the issuance of an
7 injunction.

8 And with regard to the first element, the movant
9 must make a clear showing of irreparable harm as a condition
10 for the grant of a preliminary injunction.

11 If the plaintiff succeeds in doing this, the Court
12 must then balance the first two factors. If after balancing
13 the first two factors, the balance tips decidedly in
14 behavior of the plaintiff, a preliminary injunction will be
15 granted.

16 Quote, "If the plaintiff has raised questions
17 going to the merits, so serious, substantial, difficult and
18 doubtful, as to make them fair ground for litigation and
19 thus for more deliberate investigation", citing *Blackwelder*
20 550 F.2d page 195.

21 "If however, the hardship to the plaintiff is
22 minimal or non-existent, than the burden on the plaintiff to
23 establish the likelihood of success on the merits becomes
24 considerably greater." Citing *Direx Israel*.

25 "Specifically, if the balance of hardships does

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1 not tip decidedly in plaintiff's favor, plaintiff must make
2 strong showing of substantial likelihood of success on the
3 merits by clear and convincing evidence."

4 And "if there is doubt as to the probabiltly of
5 plaintiff's ultimate success on the merits, the preliminary
6 injunction must be denied." Again, siting *Direx Israel* page
7 813.

8 Plaintiff Jeremy Mayfield and MMI -- and I agree,
9 MMI is not entitled to any injunctive relief. MMI has not
10 been suspended. MMI can hire a driver and race all they
11 want to.

12 The plaintiff Jeremy Mayfield claims he will
13 continue to lose crucial advertising sponsorship and
14 business opportunities. Each race he misses, worsens his
15 position and the stigma which goes along with his situation.

16 While the publication of this matter has been
17 widespread, certainly each race that he misses worsens his
18 position.

19 The Court finds that these circumstances may be
20 inadequately compensated by monetary damages, and finds that
21 Mayfield has sufficiently alleged irreparable harm.

22 Next, the Court must balance the harm to the
23 defendants if the injunction is granted, against the harm to
24 the plaintiff if it is denied.

25 NASCAR's arguments revolve around the safety of

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1 drivers, crews and spectators.

2 And enforcing the substance abuse policy is an
3 important aspect. However, the Court finds that the harm to
4 Mr. Mayfield substantially outweighs any harm to NASCAR.

5 NASCAR can certainly require Mr. Mayfield to take
6 drug testing before he sets foot on a track. He's not
7 driving with other drivers unless he qualifies. They can
8 test him before, during and after the race.

9 I am not -- I am not persuaded that a four day
10 effort is required, in order to conduct an appropriate
11 scientifically accurate sample.

12 Furthermore, Mr. Mayfield can be required to cough
13 up a hair sample. And we can find out from the hair sample
14 whether he's been a meth head or not.

15 I'm also interested in the incredible amount
16 48,000 nanograms per milliliter level of methamphetamine in
17 the system.

18 Contrary to the characterization from the
19 defendant, the affidavits from people who observed this man,
20 and particularly the police officer -- former police
21 officer, are entitled to some weight by the Court to show
22 that this likelihood of a false positive in this case is
23 really quite substantial.

24 So I find that the balance of harm tips decidedly
25 in the plaintiff's favor.

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1 That the defendant is minimally harmed, if at all,
2 and capable of protecting itself against any further damages
3 and destructiveness from Mr. Mayfield, by simply drug
4 testing him, getting a sample of his hair and finding out
5 whether he is a meth head or not.

6 That, folks, means that the plaintiff has raised
7 questions going to the merits, so serious, substantial,
8 difficult and doubtful, as to make them fair ground for
9 litigation and thus for more deliberate investigation.

10 Public interest, while yes, the public interest is
11 in the safety, the public interest -- I realize this is an
12 employment statute.

13 But the public interest could hardly be more
14 clearly stated by the legislature of North Carolina in the
15 statute that was enacted. That is in fact the essence of
16 the public interest when our legislature acts.

17 So I will issue a preliminary injunction,
18 directing that the ban on Mr. Mayfield be lifted. And that
19 it is subject, however, to the fact that Mr. Mayfield will
20 have to comply with whatever drug testing requirements are
21 imposed right away on him, and continue to do so. And we
22 will go forward with this matter.

23 I want the parties to get together, ASAP, on an
24 initial attorney's conference to see where we go with this
25 matter with discovery.

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1 And amongst other things, I think it would be a
2 real fine idea for everybody to take a deep breath, see if
3 you cannot come up with a methodology to resolve this
4 controversy, that is something other than, we can beat you
5 up anytime we want to.

6 And to recognize that there are levels of good
7 faith and fair dealing that are required in contractual
8 arrangements.

9 And we'll, I guess, have to see about all that
10 later on.

11 But that's the ruling of the Court today. I
12 remain convinced that it's in the best interest of all the
13 parties that you do not go out and have major press
14 conferences, and tell the world how bad the Court treated
15 you; how great the Court treated you; how wonderful this
16 result is; how terrible this result is.

17 Go about your business, maintain your gag order.
18 Everybody knows the substance involved. But let's go with
19 that.

20 MR. DIEHL: Will you draft an Order, Your Honor?

21 THE COURT: Say again?

22 MR. DIEHL: Will you prepare an Order?

23 THE COURT: My Order's going to say, for the
24 reasons stated in open court, the Motion for Preliminary
25 Injunction is granted.

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1 Thank you, counsel.

2 (Proceedings concluded at 3:35 p.m.)

3 (End of Proceedings.)

4 * * * * *

5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF NORTH CAROLINA
7 CERTIFICATE OF REPORTER

8 I, Laura Andersen, Official Court Reporter,
9 certify that the foregoing transcript is a true and correct
10 transcript of the proceedings taken and transcribed by me.

11 Dated this the 2nd day of July, 2009.

12 s/Laura Andersen
13 Laura Andersen, RMR
14 Official Court Reporter
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